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Supreme Court, U.S.
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NO. 95-982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ROBERT A. MCWHORTER,

Petitioner,

v.

GRIEVANCE ADMINISTRATOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

RESPONSE TO BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

There are material misrepresentations and contradictions in Respondent's Brief. The Michigan Supreme Court did not deny reinstatement to Petitioner, although that is the effect of the court's decision. It found Petitioner to be ineligible to reapply for reinstatement because five years had not elapsed from the termination of Petitioner's parole status to the time of his application.

This case involves the constitutional propriety of non-equity results based decisions. Justice Cavanagh, in his concurring opinion, acknowledges that the court adopted the five year, post penal supervision, waiting rule because the court disagreed with the decision of the Attorney Discipline Board. In other words, the court, contrary to its own state constitution, Art VI, §28, Mich. Const. 1963, conducted a de novo review in violation of the due process clause of the 14th Amendment.

The court did not base its decision on the nature of the offense. The court held that all persons seeking reinstatement to the practice of law, placed on penal supervision, must wait five years after the termination of that supervision before they are eligible to seek reinstatement. Implicitly, the court held that in reinstatement cases, it would exercise de novo review, irrespective of the Michigan Constitution, and, regardless of court rule, statute or constitution, permanently disbar a given reinstatement applicant, the facts not withstanding, if it so chose.

The five year, post parole, waiting requirement did not exist prior to July 5, 1995, and could not be construed to exist from a reasonable interpretation of existing court rules. Grievance Administrator admits that the purpose of the decision was "to prevent Petitioner's immediate reapplication in the present case...". (Res. Brf. p. 11)

REASONS FOR GRANTING THE WRIT

In Hertz v Woodman, 218 US 205, 30 S. Ct. 621, 54 L. Ed. 1001 (1909), this Court noted the need to promote certainty, stability and predictability of law. Results based decisions impair predictability and destabilize the law. Results based decisions are arbitrary and capricious and tend to corrupt the law. That risk is magnified when the court and the prosecutor are employer/employee; it is realized when the court and the prosecutor, in this intertwined relationship, impose retroactive rules changes, as in the instant case.

Ex Post Facto

Respondent argues that: "The decision of the Michigan Supreme Court simply presents a procedural change, and is thus not ex post facto."(Res. Brf. p.15) This is not true. The change was substantive and the procedure has not changed. The five year post termination of penal supervision rule did not exist in 1981 when Petitioner's license was revoked. It did not exist when Petitioner applied for reinstatement in April, 1992. It did not exist when Petitioner went through five separate public hearings and appeal to the Attorney Discipline Board, at substantial cost of time and funds. The new eligibility fiat did not exist prior to it retroactive application on July 5, 1995.

Respondent's reliance on Miller v Florida, 482 US 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987), and Dobbert v Florida, 432 US 282; 53 L. Ed. 2d 344, 97 St. Ct. 2290 (1977) is misplaced. The rule change in the instant case is more analogous to the sentencing change in Miller than as to who may make the final judgment in Dobbert.

This Court in In Re Ruffalo, 390 US 544, 88 S.Ct. 1222, 20 L. Ed. 2d 117, (1968) stated "disbarment...is a

punishment or penalty imposed upon the lawyer" and "quasi criminal in nature." In 1985, this Court reaffirmed its holding in Ruffalo, when it denied certiorari in Razatos v Colorado Supreme Court, 742 F. 2d 1492, (10th Circ. 1984), cert den 471 US 1016, 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985). The Razatos court also concluded that disbarment proceedings were "quasi criminal in nature."

In Miller, this Court identified a two pronged test to determine whether a particular action is ex post facto: (1) the law or rule must be retroactively applied; and (2) it must disadvantage the offender affected by it. Both are true in this case. "A law is retrospective if it 'changes the legal consequences of the acts contemplated before its effective date.'" Miller at 430, 107 S. Ct. 630. Dobbert at 294, notes that it is "axiomatic that for a law to be ex post facto it must be more onerous than the prior law." Clearly, the new rule is more onerous and ex post facto.

Double Jeopardy

Grievance Administrator states that "Petitioner has always been subject to reinstatement criteria that would require him to establish by clear and convincing evidence that he is fit to resume the practice of law." (Res. Brf. p. 17) This argument is beside the point as the hearing panel and Attorney Discipline Board held that Petitioner met that standard. Petitioner met the standard that has been applied to every other lawyer seeking reinstatement in the State of Michigan since the adoption of the bifurcated system in 1978 but was declared, retroactively, ineligible to apply.

In order to deny reinstatement to this particular Petitioner, the court created the legal fiction that the hearing panel of three lawyers and the Attorney Discipline Board, consisting of distinguished lawyers, such as George E.

Bushnell, Jr., past president State Bar of Michigan and American Bar Association, and distinguished laymen, such as Linda Hotchkiss, M.D., were incapable of making a factual determination of whether Petitioner could safely be recommended as a person fit to practice law or whether he had a proper understanding and attitude toward the standards that are imposed upon members of the Bar.[1] Such legal fiction is absurd. Judges and juries make these types of decisions every day.

On March 1, 1994, the supreme court adopted MCR 9.123(D)(3) that provides that an attorney who has been denied reinstatement may reapply "180 days from the effective date of the most recent hearing panel order granting or denying reinstatement." As additional punishment, the court concluded that the three year period after the termination of Petitioner's parole could not be considered in evaluating Petitioner's fitness to practice law because Petitioner was under "scrutiny" while Respondent appealed and therefore Petitioner must wait until June 27, 1997, to reapply.[2] Both MCR 9.123(B)(2) and MCR 9.123(D)(3) were denied application to Petitioner.

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[1] In this case, the Attorney Discipline Board considered whether supervision had materially affected Petitioner's conduct as it pertained to his reinstatement, remanded the issue for special hearing and concluded that the extent of his supervision was so minimal as to be irrelevant. The supreme court factually overruled the Board stating it was not the extent but the fact of supervision that denied eligibility for reinstatement.

[2] Respondent orally argued to the supreme court that if Petitioner were merely denied reinstatement, under MCR 9.123(D) Petitioner could immediately reapply for reinstatement. As punishment, to prevent Petitioner's reapplication, he was arbitrarily excepted from the court rule and, effectively required to wait 1,541 days to reapply instead of 180 days.

The retroactive application of these civil sanctions can not "fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes" and are "punishment, as we have come to understand the term." U.S. v Halper 490 US 435; 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). This decision is based not on the offense but on the form of punishment and violates the double jeopardy clause.

Due Process

All of the foregoing facts and reasons regarding ex post facto and double jeopardy amount to denial of due process as well. After Petitioner had met all the criteria for reinstatement, by clear and convincing evidence, by public hearing before a hearing panel of licensed attorneys, and the decision to reinstate affirmed on appeal by the Attorney Discipline Board, the Michigan Supreme Court changed the rules and declared that Petitioner was ineligible to apply for reinstatement in the first instance. This defies the legal "sense of fair play" mandated by this Court and the Constitution. Galvin v Press, 347 US 522, 530, 74 S. Ct. 737, 742, 98 L. Ed. 911 (1954).

Grievance Administrator states that there is a question "as to what process is due". (Res. Brf. p.18) The language of MCR 9.123(B)(2) has been in effect since 1978. Every court and every hearing panel has interpreted the rule to mean that a lawyer whose license to practice has been revoked may apply for reinstatement five years after the date of his or her revocation. In Rio Grand Irrigation & C. Co. v Guildersleeve, 174 US 603, 19 S. Ct. 761, 43 L. Ed. 1103 (1898).

> **A duly authorized rule of court has the force of law, and is binding upon the court**

> **as well as upon the parties to an action, and cannot be dispensed with to suit the circumstances of any particular case .. but once made without qualification, it must be applied in all cases which come within it, until it is repealed by the authority which made it."**

In Harrison v Nelson, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969) this Court stated:

> **We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.** (Emphasis added)

Similar conclusions have been reached by the Michigan courts. In Hill v Webber, 50 Mich 142, 15 NW 52 (1883) it was held that a party is entitled to insist upon strict compliance with court rules and in City of Detroit v Judge of Recorders Court, 255 Mich 44; 237 NW 40 (1931) it was stated that a court "ought not to depart from established practice suddenly and without notice and to injury of litigants". In Steward v Poole, 196 Mich App 26; 492 NW2d 475 (1992) the court stated that the interpretation of a court rule is subject to those principles governing statutory construction and the court rule should be construed in accordance with the ordinary and approved usage of the

language.

In the instant case, the court violated all of these principles. Compliance with these principles is the process due Petitioner.

Respondent repeatedly states that the new five year post parole requirement is to "ensure that any decision as to whether an applicant for reinstatement has been truly rehabilitated is based on a proper foundation." Respondent could not cite, if required, more than one or two instances in the history of the practice of law in Michigan, where a disbarred lawyer was reinstated and thereafter was subsequently suspended or revoked for new misconduct.

Actually, the court's decision goes beyond the five year post parole requirement. MCR 9.123 and Grievance Administrator v August, 438 Mich 296, 475 NW2d 256 (1991) make clear that there is no permanent disbarment in Michigan. Contrary to MCR 9.123 and August, the language of this decision develops a form of selective permanent disbarment.

Justice Brickley wrote that "even though a period of time has elapsed since Petitioner was under the supervision parole authorities, he has been involved in his petition for reinstatement since his release from parole." Therefore, because Petitioner was applying for his license, post parole time could not be considered because Petitioner was under "similar, if not heightened scrutiny..." Justice Weaver noted that **"Petitioner will remain under our scrutiny and will probably attempt to conform his conduct to our standard until he reaches his goal of readmittance"** and therefore, the five year rule is illogical. According to Judge Weaver, Petitioner can never establish the qualifications to be readmitted. This reasoning cannot be extrapolated from the

language of MCR 9.123. This reasoning is clearly a rewriting of the rules, after the fact, by judicial interpretation and violates due process.

The court, contrary to Respondent, did not address the evidence submitted to the hearing panel or the Attorney Discipline Board. Neither Respondent nor the court contested the hearing panel and Attorney Discipline Board's findings regarding Petitioner's establishment of the reinstatement criteria. The court found lack of eligibility to reapply.

Respondent states that MCL 338.41-338.47 "pertains only to those occupations and professions regulated by the executive branch of government." Respondent cites no authority for this proposition. The practice of law is a profession. The statutes speak for themselves and the court rules must be read in light of the statute. Masonite Corp. v Martin, 314 Mich 411, 22 NW2d 757 (1946). The due process mandated by the 14th Amendment has been denied.

Equal Protection

Respondent claims that the only difference between Petitioner and other disbarred attorneys is that the Supreme Court's holding provides a method for determining whether Petitioner has spent adequate "unsupervised" time to enable a proper evaluation of his rehabilitation and that "such a distinction has a rational basis." (Res. Brf. p.21) This statement is absolutely untrue. There is no "method" stated for determining the amount of "unsupervised time to evaluate rehabilitation" and no other lawyer seeking reinstatement has been subject to this "method."

By silence, Respondent admits that a hundred or more Michigan lawyers, were similarly situated to Petition between 1986 and 1995. All of these lawyers had their licenses suspended or revoked for criminal or gross misconduct,

many of whom were placed on some form of penal supervision. Respondent further admits that none of these "similarly situated" attorneys was denied reinstatement because of his supervision status or required to wait five years from the termination of such supervision to apply for reinstatement.[3]

There is no rational basis for distinguishing Petitioner from the hundred or more other attorneys, no rational basis for the retroactive application of this "new rule", and no rational basis nor legitimate state interest furthered by utilizing the punishment inflicted on a given disbarred attorney as opposed to the nature of the offense to determine fitness to practice law.

In August, the court focused on the offense to determine fitness to practice:

> Obviously, the question whether an attorney may be safely recommended to the public is a different inquiry in the case of an attorney disbarred for corrupting the administration of law than in the case of an attorney whose disbarment resulted from conduct unrelated to the practice of law. (438 Mich at 310)

Petitioner's convictions were unrelated to the practice of law and the court, to avoid reinstatement, changed the focus.

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[3] i.e. Attorneys James DeVries, ADB File 90-106 RP and Joseph Jerkins, ADB File 91-61 RP, both from Petitioner's home town, were charged with money laundering and participation in large scale drug operations. Both were sentenced to prison with additional supervised release of at least two (2) years. Both negotiated sentence reductions and suspension of license instead of revocation in exchange for cooperation. Within six months of the termination of their supervised releases, both were reinstated to the practice of law and Respondent did not appeal.

The distinction between Petitioner and the other attorneys similarly situated, is non-existent. The concept of equal justice under the law requires the state to govern impartially and it may not draw distinctions between individuals solely on differences that are irrelevant. Lehr v Robertson, 486 US 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). Equal protection keeps governmental decision makers from treating differently persons who are in all relevant aspects alike. Nordlingler v Hahn, __ US __, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992).

To withstand intermediate scrutiny under equal protection, the classification must be substantially related to an important governmental objective. Clark v Jeter, 486 US 456, 100 S. Ct. 1910, 100 L. Ed. 2d 465 (1988). The extent of Petitioner's rehabilitation is not in question and retroactive application of the new rule has no "important governmental objective."

The instant case is, allegedly, based in part on The Matter of Callanan, 440 Mich 1207; 487 NW2d 750 (1992). This decision was a preemptory reversal order without consideration of the merits. There was an issue in that case as to whether his parole had terminated. Immediately after the preemptory order, Callanan reapplied, was reinstated and has practiced for two years. Respondent now argues in Callanan that he should have his license revoked because of the court's decision in this case. (1a-23a) This is the circuitous reasoning being utilized by the court to deny equal protection.

CONCLUSION

Petitioner prays that a Writ of Certiorari be granted.

Dated: 2/9/96 Robert A McWhorter

Robert A. McWhorter, Petitioner

Michigan Supreme Court
Lansing, Michigan

Order
Entered: August 7, 1992
Michael F. Cavanagh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Justices

In the Matter of Reinstatement
of **EVAN H. CALLANAN, JR.**

EVAN H. CALLANAN, JR.
Petitioner-Appellee,

v

GRIEVANCE ADMISTRATOR,
Appellant.

No. 93833

On order of the Court, the application for leave to appeal is considered and, pursuant to MCR 7.302(F)(1) in lieu of granting leave to appeal, we REVERSE the order of the Attorney Discipline Board, and ORDER that the petitioner not be reinstated at this time. The misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the

hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission. MCR 9.123(B)(6) and (7). In light of this order, the stay entered by this Court on July 16, 1992 is VACATED as no longer necessary.

LEVIN, Justice, states as follows:

I would deny or grant leave to appeal. I adhere to the view that peremptory reversal should be reserved for cases in which the law is settled and no factual assessment is required.[1] In the instant case, as indicated in the peremptory order, factual and legal assessment is not appropriate. Further, this Court's peremptory disposition does not comply with the requirements of Const. 1963, art. 6, §6, which requires that "[d]ecisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision...."

The order of peremptory reversal of the Attorney Discipline Board does not contain an adequate statement of facts or reasons for decision.

The Hearing Panel of the Attorney Discipline Board ordered that Evan H. Callanan, Jr., be reinstated subject to certain conditions. The Grievance Administrator filed a petition for review with the Attorney Discipline Board, the board conducted a hearing, and remanded to the hearing panel with instructions to file a supplement referring to the standards and criteria approved by this Court in Grievance Administrator v August, 438 Mich 296, 475 NW2d 256 (1991).

The hearing panel concluded, for reasons stated in its supplemental report, that Callanan desired in good faith to be restored to the privilege of practicing law, that five years had

elapsed since revocation of his license, that he had not practiced or attempted to practice law contrary to the requirements of the revocation, and that he had fully complied with the order of discipline. The supplemental report continued:

> "5. From the testimony of the witnesses it appears that the Petitioner is held in high esteem in his community and his church in spite of the fact that the minister and the members of the congregations are aware of his prior criminal conviction and time in prison. The testimony further related that he is well received and respected by all persons in his community. Further testimony reflected that members of the church would hold the Petitioner in a position of trust, further seeking his services were he to be returned to the practice of law.
>
> "Testimony of the Petitioner reflected that he is aware of the gravity of his offense and is very eager to be reinstated to the practice of law. It appears that there has been no controversy in the operation of the motel business in which the Petitionier has been engaged and, therefore, this Panel has concluded that the Petitioner's conduct since the order of discipline has been exemplary and above reproach.
>
> "6. From the testimony of the Petitioner, as well as attorney Robert E. Sage, the Panel concluded the Petitioner has the proper understanding of and attitude toward to standards that are imposed on members of the bar and that he will conduct himself in conformity with those standards.
>
> "7. The Hearing Panel considered the length of time the Petitioner has been suspencded and the severity of

> the offense for which he was suspended and have concluded that he can be safely recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence and in general to aid in the administration of justice as a member of the bar and as an officer of the court."

The Attorney Discipline Board considered the supplemental report together with further objections filed by the Grievance Administrator. The board, in a decision in which all members of the board joined, stated that it was persuaded the hearing panel's findings and conclusions had appropriate evidentiary support in the record, and the order of reinstatement should be affirmed subject to the terms and conditions contained in the panel's order, and the further conditions set forth in the board's order, which included that Callanan provide evidence that he had been discharged from parole. It appears that Callanan's parole began no later than his release from a halfway house in November, 1988. almost four years ago-it does not readily appear when his parole actually terminated.

The statement in this Court's order that the misconduct that led to the revocation of Callanan's license to practice law was substantial, and, because he had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel or the Attorney Discipline Board to determine his present fitness for readmission, provides little or no guidance to Callanan, the public, the profession, hearing panels, and the Attorney Discipline Board concerning what might constitute an appropriate period of time in light of the seriousness of the

misconduct.

[1] People v Wright 439 Mich 910, 910-911, 479 NW2d 631 (1992) Levin, J. dissenting); Roek v Chippewa Valley Bd. of Ed., 430 Mich 314, 322, 422 NW2d 680 1988) (Levin, J., separate opinion); Grames v Amerisure Ins. Co., 434 Mich 867, 868-875, 451 NW2d 304 (1990) (Levin, J. dissenting); People v Little, 434 Mich 752, 769-770, 456 NW2d 237 (1990) (Levin, J. dissenting); People v Wrenn, 434 Mich 885, 885-886, 452 NW2d 469 (1990) (Levin, J., dissenting);Harkins v Northwest Activity Ctr., Inc., 434 Mich 896, 899, 453 NW2d 677 (1990) (Levin, J., dissenting); Dep't. of Social Services v American Commercial Liability Ins. Co., 435 Mich 508, 515, 460 NW2d 194 (1990)(Levin, J., separate opinion); Yahr v Garcia, 436 Mich 872, 461 NW2d 363 (1990)(Levin, J. dissenting);Universal Underwriters Ins. Co. v Vallejo, 436 Mich 873, 873-874, 461 NW2d 364 (1990)(Levin, J. dissenting); People v Stephens, 437 Mich 903, 903-910, 465 NW2d 561 (1991) (Levin, J. dissenting); People v Berkey, 437 Mich 40, 54, 467 NW2d 6 (1991)(Levin, J. dissenting); Turner v Washtenaw Co. Rd. Comm., 437 Mich 35, 38-39, 467 NW2d 4 (1991)(Levin, J. separate opinion); Lepior v Venice Twp., 437 Mich 955, 956-966, 467 NW2d 811 (1991)(Levin, J. dissenting); City of Rochester Hills v Southeastern Oakland County Resource Recovery Authority, 440 Mich ___, 486 NW2d 678 (1992)(Levin, J. dissenting).

See Schweiker v Hansen, 450 US 785, 791, 101 S. Ct. 1468, 1472, 67 L. Ed. 2d 685 (1981) (Marshall, J., dissenting)("A summary reversal is a rare disposition usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the

decision below is clearly in error"); Leis v Flynt, 439 US 438, 457-458, 99 S. Ct. 698, 708-709, 58 L. Ed. 2d 717 (1979) (Stevens, J. , dissenting)("Summary reversal 'should be reserved for palpably clear cases of ...error' Eaton v Tulsa, 415 US 697, 707, 94 S. Ct. 1228, 1234, 39 L. Ed. 2d 693 [1974][Rehnquist, J., dissenting]").

Michigan Supreme Court
Lansing, Michigan

Order
Entered: November 7, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In the Matter of Reinstatement
of **EVAN H. CALLANAN, JR.**

EVAN H. CALLANAN, JR.
Petitioner-Appellee,

v

GRIEVANCE ADMISTRATOR,
Appellant.

SC 101137
ADB 92-324-RP

On order of the Court, the application for leave to appeal is considered and , pursuant to MCR 7.302(F)(1) in lieu of granting leave to appeal, we REMAND this matter to the Attorney Discipline Board for reconsideration in light of this Court's decision in In re Petition for Reinstatement of Robert McWhorter, 449 Mich 130 (1995).

We do not retain jurisdiction.

Mallett, JR. and Weaver, JJ., would grant leave to appeal.

I, **CORBIN R. DAVIS**, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

_____, 199_ _____

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Petition for
Reinstatement of EVAN H. CALLANAN, JR.
ADB Case No. 92-324-RP

Petitioner.

/

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/

ATTORNEY GRIEVANCE COMMISSION'S SUPPLEMENTAL BRIEF FOLLOWING THE MICHIGAN SUPREME COURT ORDER OF REMAND

NOW COMES Richard L. Cunningham, Associate Counsel, Attorney Grievance Commission, and, pursuant to the Order entered by the Attorney Discipline Board on November 20, 1995, here provides its brief on the

applicability of the Michigan Supreme Court's decision in In re Petition for Reinstatement of Robert McWhorter, 449 Mich 130, (1995), to the present case.

Statement of Relevant Facts

Petitioner Evan H. Callanan, Jr. was tried before a jury in the U.S. District Court for the Eastern District of Michigan, and on September 1, 1983 was convicted of felony offenses including conspiracy to violate RICO, substantive violations of RICO, three counts of mail fraud, obstructing a criminal investigation, and making false declarations before a grand jury. The charges arose from evidence of Petitioner's involvement in a scheme in which a Michigan judge received improper kickbacks in exchange for judicial favors, and from Petitioner's attempts to cover-up such illegal activity.

Petitioner received concurrent sentences of eight years on each of the RICO charges and five years on the other counts. The court allowed petitioner to remain free on bond while he pursued an appeal, but he was suspended from the practice of law pursuant to MCR 9.120(A)(2). Petitioner's license to practice law was automatically suspended effective the date of the jury verdict, and the interim suspension remained in effect while he appealed his criminal convictions.

In November 1985 the U.S. Sixth Circuit Court of Appeals affirmed all Petitioner's convictions, specifically finding that the evidence was sufficient to sustain the convictions for conspiracy to violate RICO and the substantive violations of RICO. United States v Oaoud, 777 F2d 1105, (6th Cir. 1985). Petitioner surrendered to the appropriate authorities on December 2, 1985, and began serving his sentence.

On March 14, 1986 Wayne County Hearing Panel #20 issued an Order of Revocation based upon these felony convictions. The final order of discipline provided that Appellee's license was revoked, nunc pro tunc, effective September 1, 1983.

While Appellee was serving his prison sentence, the United States Supreme Court announced in McNally v United States, 483 U.S. 350, 107 S. Ct. 2875 (1987), that a prosecution under the mail fraud statute could not proceed on an "intangible rights theory". The court held that a defendant could not be punished for a scheme which deprived a person of the intangible right of honest services, as the statute covered only tangible rights such as money and property. Consequently, Petitioner's case came back before the U.S. Sixth Circuit Court of Appeals, and his convictions for mail fraud, and RICO violations premised on certain acts of mail fraud, were vacated. However, the court again affirmed the convictions an five year concurrent sentences for obstruction of a criminal investigation and perjury. Callanan v United States, 881 F2d 229 (6th Cir. 1989).

Petitioner remained incarcerated in federal correctional facilities until November 1988. He was then placed in a half-way house for several months, and was placed on federal parole in early 1989.

On or about August 17, 1990, while Petitioner was still on parole, he filed a petition seeking reinstatement of his license to practice law. The petition came before Attorney Discipline Board Tri-County Hearing Panel #75 under ADB Case No. 90-140-RP, and a hearing was conducted. On May 8, 1991, the hearing panel issued an Order of Reinstatement, directing that Appellee be reinstated to the practice of law. The order conditioned Appellee's reinstatement upon

recertification by the Board of Law Examiners, proof of his discharge from federal parole and payment of costs in the amount of $1,774.53.

The Attorney Grievance Commission appealed this Order of Reinstatement by filing a petition for review under MCR 9.118. In a brief filed on June 21, 1991, the Commission argued that Petitioner failed to establish compliance with MCR 9.123(B) by clear and convincing evidence. The Commission asserted that since Petitioner was only recently released from incarceration, and was still under federal parole supervision, the panel lacked an adequate basis by which to gauge his reformation.

On August 29, 1991, while the appeal on ADB Case No. 90-140-RP was still pending before the Attorney Discipline Board, the Michigan Supreme Court issued its opinion in Grievance Administrator v August, 438 Mich 296. In that case, the court held that the nature of the offense and the time elapsed since its commission and disbarment are relevant and important considerations in determining whether a disbarred attorneys should be recommended to the position of public trust that is held by the members of the bar. The court determined that an attorney may be denied readmission on the grounds that sufficient time has not passed to determine the present fitness of the applicant for readmission.

ADB Case No. 90-140-RP came before the Attorney Discipline Board for oral arguments on September 11, 1991. After hearing arguments, the Board remanded the case to the hearing panel or a supplement report. The Board expressly ordered the panel to consider the standards and criteria for reinstatement expressed in Grievance Administrator v August, supra.

On February 12, 1992, the hearing panel filed a

Supplemental Report, stating that it had reviewed the matter "in camera" and had determined it appropriate to affirm its prior Order of Reinstatement. On April 14, 1992, the Attorney Discipline Board issued an order affirming the hearing panel.

The Attorney Grievance Commission then filed an Application For Leave To Appeal with the Michigan Supreme Court. The Commission requested review of the final orders of the Tri-County Hearing Panel #75 and the Attorney Discipline Board, and asked that the reinstatement order be stayed pending the appeal.

On July 16, 1992, the Supreme Court issued the stay requested by the Attorney Grievance Commission. Since Petitioner had not yet fully met the conditions of reinstatement set by the hearing panel, he was not yet readmitted at the time the stay was issued.

On August 7, 1992, the Michigan Supreme Court issued its Order, under docket number SC 93833, reversing the Attorney Discipline Board and ordering that Petitioner not be reinstated to the practice of law. The court determined that the misconduct which led to the reinstatement was substantial, and since Petitioner had spent little or no time outside the supervision of federal authorities it was not possible to determine his present fitness for readmission. The court did not indicate what period of time outside supervision would be sufficient for a proper evaluation of Petitioner's reformation.

On or about August 26, 1992, Petitioner filed a Petition For Reconsideration with the Supreme Court. On November 24, 1992, the court entered an Order denying the motion for reconsideration.

On December 11, 1992, less than three weeks after

the Supreme Court denied Appellee's motion for reconsideration, Appellee filed a new petition for reinstatement. The new petition was assigned to Tri-County Hearing Panel #29 under the file number 92-324-RP.

The Hearing Panel heard evidence on the petition on May 10, May 24, and June 14, 1993. On October 7, 1993, the panel issued its Order Of Reinstatement and Report. In its report, the panel made the findings that Petitioner was discharged from parole on April 7, 1992, and that he has now spent a substantial period of time outside the supervision of federal authorities.

The Attorney Grievance Commission then filed a Petition for Review with the Attorney Discipline Board, appealing the decision of the hearing panel to reinstate Petitioner to the practice of law. The commission further requested that Petitioner's reinstatement be stayed, pending the appeal.

On November 12, 1993, the Attorney Discipline Board denied the Petition For Stay of Order Of Reinstatement. Petitioner then complied with the condition set forth in the Order Of Reinstatement, and on November 16, 1993, was reinstated to the practice of law.

The appeal by the Attorney Grievance Commission came before the Attorney Discipline Board for oral argument on December 16, 1993. After hearing arguments of counsel, the board took the matter under advisement. On September 29, 1994, the Attorney Discipline Board announced, in a 4 to 3 decision, that the hearing panel Order of Reinstatement was affirmed in all respects. While the Attorney Discipline Board determined that Appellee was actually discharged from federal supervision on November 30, 1990, and that there was a lack of evidentiary support for the hearing panel

finding that such supervision ended on April 7, 1992, it affirmed the panel's conclusion that sufficient time had passed since the end of supervision to make a valid finding as to Appellee's fitness for reinstatement.

On October 19, 1994, the Attorney Grievance Commission filed an Application for Leave To Appeal with the Michigan Supreme Court, therein requesting review of the Hearing Panel and Attorney Discipline Board Orders which reinstated Petitioner to the practice of law.

On July 5, 1995, the Michigan Supreme Court issued its opinion in In re Petition for Reinstatement of Robert A. McWhorter, 449 Mich 130. In that case, the court found that the petitioner had not spent adequate time outside the supervision of parole authorities sufficient to demonstrate that he has a proper understanding of an attitude toward the standards imposed on members of the bar or that he will conduct himself in conformity with those standards. The court held that the petitioner could not reapply for reinstatement until five years after the date of his release from federal parole.

On November 7, 1995, the Michigan Supreme Court entered an Order concerning the application for leave to appeal filed by the attorney Grievance Commission on October 19, 1994 in the present case. In lieu of granting leave, the Supreme Court remanded the matter to the Attorney Discipline Board for reconsideration in light of the Court's decision in McWhorter, supra.

On November 20, 1995, the attorney Discipline Board entered an Order, therein directing the parties to present a brief on the applicability of the McWhorter decision to the present case.

Since receiving the November 20, 1995 Order of the

Attorney Discipline Board the Attorney Grievance Commission has conducted additional investigation on the question as to when Petitioner Evan H. Callanan was released from federal parole. Based upon this supplemental investigation, the Attorney Grievance Commission will accept, and does not challenge, the Board's determination that parole ended on November 30, 1990.

Argument One

Petitioner's Reinstatement To The Practice Of Law Was Premature. There Was Insufficient Time Between The End Of Petitioner's Federal Parole And The Reinstatement Hearing For The Panel To Adequately Evaluate His Eligibility For Reinstatement.

Petitioner Evan H. Callanan, Jr. was released from prison in November 1988, but resided in a half-way house until February 1989. He remained subject to the supervision of parole authorities until November 1990. The current petition for reinstatement was filed in December 1992, less than 25 months after his release from parole. The evidentiary record for the reinstatement hearing was closed on June 14, 1993, less than 31 months after the expiration of the parole period. While Tri-County Hearing Panel #29 concluded that Petitioner had established by clear and convincing evidence his eligibility for reinstatement under the criteria set forth at MCR 9.123(B), there was not sufficient time between his discharge from parole and the presentation of proofs on the issue to make such a finding.

In re Petitioner for Reinstatement of Robert A. McWhorter, 449 Mich 130 (1995), is directly on point. There the court held that the relevant inquiry in a reinstatement proceeding is whether a petitioner has spent enough time outside the supervision of parole authorities in order for a hearing panel to properly evaluate a disbarred

attorney's present ability to comport with the fitness requirements. In making this finding, the court expressly noted that the extent of parol supervision was not determinative, and the critical consideration was the fact that he was on parole.

The court concluded that petitioner McWhorter had not spent enough time away from the authority of parole officers to demonstrate by clear and convincing evidence that he may be safely recommended as a person fit to represent others in matters of trust and confidence. Likewise, the court determined that sufficient time had not passed from his release from parole for him to adequately demonstrate a proper understanding of, and attitude toward, the standards imposed on members of the bar. in deciding that an insufficient time had passed since this petitioner's release from parole, the court announced a general rule concerning the minimum time that must pass before such a petitioner may be permitted to apply for reinstatement. The court set the minimum tome period at five years from the date of termination of parole.

Writing for the court, Chief Justice Brickley announced the five year waiting period, and noted at 449 Mich 142,

> We borrow this time span from CR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities an the contemplation of petition for reinstatement to fully evaluate his fitness to practice law.

While only Justice Mallet joined with the Chief Justice in the court's opinion, the separate concurring opinion of Justice Riley, which was joined by Justice Boyle, makes

it clear that a majority of the Supreme Court accepts the bright line rule of a five year minimum waiting period after termination of parole. Justice Riley's short concurring opinion leaves no doubt that a solid majority of the court finds that a disbarred attorneys should not be permitted to reapply until five years after parole has ended. As she stated at 449 Mich 143-144,

> We agree with Justice Weaver's assessment that this record calls for the permanent disbarment of Mr. McWhorter. However, in the absence of a majority recognizing the proposition that there should be 'permanent' disbarment, with no opportunity ever to reapply, we join in the ruling of the lead opinion imposing a five year waiting period following a period of parole supervision.

The rule requiring a minimum five year waiting period after the end of parole is clearly applicable to the present case. It must be remembered that the Michigan Supreme Court has already reviewed a prior reinstatement petition by Petitioner Callanan, and has determined that it would not be possible for a hearing panel to properly evaluate his eligibility for reinstatement until he has spent a sufficient amount of time outside the authority of parole officials. When the Attorney Grievance Commission challenged the prior order of reinstatement issued in ADB Case 90-140-RP by an application for leave to appeal, the Supreme Court peremptorily reversed the decision of the Attorney Discipline Board and ordered that Petitioner Callanan not be reinstated. In an Order issued on August 7, 1992, under Supreme Court Case No. 93833, the court stated:

> The misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had

spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission. MCR 9.123(B)(6) and (7).

In its action on Petitioner's prior application for readmission, the Supreme Court made it clear that the serious nature of the misconduct that led to disbarment required a substantial period of time outside the supervision of parole authorities for a proper evaluation of his eligibility for reinstatement, but the court did not indicate what period of time was sufficient. With the decision in McWhorter, it is now seen that any period of time less than five years after the release from parole is always insufficient for a proper evaluation in such cases. Thus the finding of Tri-County Hearing Panel #29, based upon a petition filed less than 25 months after release from parole and testimony taken less than 31 months after discharge, is not adequately supported.

Argument Two

Petitioner Should Be Prohibited From Reapplying For Reinstatement For Another Five Years. Because He has Been Under The Scrutiny Of The Disciplinary System, A Hearing Panel Would Not Yet Be Able To Safely Judge Whether He Has Now Been Rehabilitated.

Petitioner's petition for reinstatement in ADB Case No. 90-140-RP was denied by the Order of the Michigan Supreme Court issued on August 7, 1992. Shortly thereafter, Petitioner requested reconsideration of the denial. On November 24, 1994, the Supreme Court denied the motion for reconsideration. Less than three weeks later, on December 11, 1992, Petitioner filed a new petition for reinstatement. That second petition resulted in the

proceedings that are now under review. Since disciplinary proceedings have been pending continuously since the filing of this second petition, Petitioner has been under the scrutiny of teh disciplinary system since he filed that second petition;

The scrutiny to which a person is subject by pending reinstatement proceedings must be considered similar to the supervision to which a parolee is subject by "non-rigid" overview of the parole authorities. As the court recognized in McWhorter, supra, at 449 Mich 142, N. 16.

> We note that even though a period of time has now elapsed since petitioner was under the supervision of parole authorities, he has been involved in his petition for reinstatement since his release from parole. Therefore, we are equally unable to safely judge whether petitioner has now been rehabilitated - ever though some time has elapsed outside the supervision of parole authorities - because his action have been under similar, if not heightened, scrutiny by the Attorney Grievance Commission, the hearing panel, and the Attorney Discipline Board.

The very essence of the McWhorter decision is that it is not really possible to evaluate whether a person has been truly rehabilitated until he or she was [has] spent substantial time outside the scrutiny or supervision of a person or agency with authority over him or her. Rehabilitation is demonstrated by a review of what a person has done when left on his or her own, not what he or she has done while being watched. Since Petitioner has been under the scrutiny of the disciplinary system while his petition has been pending, it is not possible to get a true picture of his rehabilitation.

It is the actions of a person during the period of time to which he or she is not subject to supervision or scrutiny

that shows whether or not he or she has actually been rehabilitated. In an effort to assist the bar in determining whether sufficient time has passed outside such supervision,t eh court in McWhorter held that a minimum period of five years is always required for a proper evaluation. Even though the circumstances of any individual case may establish that five years outside supervision is not sufficient to make a valid judgment of rehabilitation, no valid decision can be made without an examination of a petitioner's conduct for five years outside supervision or special scrutiny.

In the present case, Petitioner's parole expired on November 30, 1990. Thus the five year period following the end of parole supervision has expired. However, Petitioner was under the scrutiny of the disciplinary system during that period following termination of parole, and has not yet spend any substantial time completely on his own. When the Supreme Court stated by its Order of August 7, 1992 that an insufficient time had passed outside the supervision of federal authorities to adequately determine his fitness to practice, Petitioner chose to almost immediately file a new petition rather than develop a history of actions outside any close scrutiny. In doing so, Petitioner made it impossible for any hearing panel to adequately determine his rehabilitation until at least five years after the resolution of the second petition.

The fact that premature petition for reinstatement, and the resulting special scrutiny of the disciplinary system, must extend the period during which a disbarred attorney is prohibited from seeking reinstatement is implicitly recognized in McWhorter. In imposing the five year period following release from federal parole, the court stated at 449 Mich 142,

> We are persuaded that this addresses the problem identified by one commentator: "The disbarred attorney may file another petition at a later date. In light of this, it would be

> helpful if the rules provided a minimum spacing between subsequent petitions to prevent a lawyer whose petition is denied from immediately filing another petition.

Such language demonstrates the court's disapproval of the filing of a new petition for reinstatement directly on the heels of the denial of a prior petition, and supports the argument that a petitioner must spend sufficient time outside the scrutiny of disciplinary authorities before requesting reinstatement. Respondent should not now be permitted to file a new reinstatement petition simply because the five year period following termination of parole has recently expired. The critical issue is whether sufficient time outside any special scrutiny or supervision has expired to enable a fair evaluation of rehabilitation, not simply whether five years have passed since the end of parole.

By reversing the hearing panel, and denying the petition for reinstatement, the Attorney Discipline Board will end the special scrutiny to which Petitioner has been subject while the disciplinary proceedings have been pending. Petitioner can then get on with his life, and his true character will emerge from his actions during the period when he is on his own. If Petitioner brings a new petition, after awaiting period of at least five years on his own, a hearing panel would have a more realistic basis from which to evaluate his true rehabilitation.

Conclusion

For the reasons herein stated and discussed, the Attorney Discipline Board should reconsider and vacate its September 29, 1994 Order Affirming Hearing Panel Order Of Reinstatement, reverse the Order Of Reinstatement entered by Tri-County Hearing Panel #29, deny the petition for reinstatement, and enter an order prohibiting Petitioner Evan H. Callanan, Jr. from reapplying for reinstatement for at least another five years.

Dated: Detroit, Michigan
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